No. 11,990

IN THE

United States Court of Appeals

For the Ninth Circuit

ESTELLA LATTA et al.,
Appellants,

vs.

WESTERN INVESTMENT COMPANY et al.,
Appellees.

Brief of Appellees

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CASES

TEXT BOOKS, STATUTES, ETC.

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FOREWORD

It is almost impossible, within the space permitted by the rules of this Court, for appellees to correct all the many misstatements of essential matters and miscitations in appellants' brief, to call attention to their almost invariable misquotations from authorities, to the many paragraphs, and parts of paragraphs, in their brief purporting to be quotations from decisions which consist of language which either does not appear in the decision, or has been materially altered.*

*Careful check discloses that of the numerous citations of authorities and some 55 purported quotations therefrom in both the original and supplemental briefs of appellants, correct cita-

The preparation and submission to the Court of a helpful reply brief on this appeal has also been rendered difficult by the failure of appellants to comply fully with essential requirements of subparagraphs (a), (b) and (f) of paragraph 2 of Rule 20 of this Court, and their very inadequate compliance with subparagraph (c) thereof. It is also rendered difficult by appellants' scattered assertions in their brief of points having no bearing upon the issue here presented and by repeated statements of what they believe to be the law without supporting authorities.

Appellees have concluded that it would be most helpful to present the case, as made out in the record, with supporting authorities, and in the course of the argument to reply to such matters in appellants' brief as appear germane to the issues.

STATEMENT OF THE CASE

Mark Hopkins, a resident of California, died intestate on March 29, 1878 (R. 5). He left real and personal property in California. Mary Frances Sherwood Hopkins, as his surviving wife, filed an application with the Superior Court in San Francisco for letters of administration which were issued to her on June 3, 1878 (R. 6). On or about August 26, 1881, Moses Hopkins, a brother of decedent, was substituted as administrator, and continued to act as such until November 1, 1883, when a decree of final distribution was rendered by the late J. V. Coffey, Judge of

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tions were the exception rather than the rule. Only five quotations were found to be correct. Many quotations were of whole cloth (e.g., that on middle of page 33 of appellants' main brief).

the Superior Court (R. 49-53). While the files in the County Clerk's office in San Francisco, including the probate records in the Mark Hopkins estate, had been destroyed in the 1906 fire (R. 101), authentic copies of the decree of final distribution had been recorded in other counties (R. 144-150) and are therefore available.

Estella Latta, Jones M. Griffin and Alwin Chambers, as plaintiffs, filed a complaint in the court below on May 2, 1947 (R. 2-48) alleging that they "appear herein as plaintiffs for themselves and for all other heirs of Mark Hopkins, similarly situated whose names are set forth in Exhibit 'F' " (R. 3). It appears from the complaint itself, however, that none of the three plaintiffs are or were heirs of Mark Hopkins and that none of the persons named in Exhibit "F" (R. 70) are or were heirs of Mark Hopkins. It is only alleged that they are descendants of brothers and sisters of Mark Hopkins, but with no allegation that they succeeded to the estates of their respective ancestors (Par. 14 of Complaint, R. 6).

The complaint asks the court to adjudge:

1. That the plaintiffs and the persons named in Exhibit "F" "are the heirs of Mark Hopkins, deceased" (R. 46);

2. That the decree of distribution rendered in the Estate of Mark Hopkins, deceased, on November 1, 1883, "is null and void" (R. 46);

3. That certain property described in the complaint "remained a part of the estate of Mark Hopkins, undistributed" (R. 46);

4. That if the court finds the decree of distribution valid, it adjudge that certain property did not pass to the

distributees, but that a portion thereof was vested in plaintiffs, subject to administration (R. 47);

5. That the District Court direct the Superior Court to appoint an administrator, *de bonis non,* etc. (R. 47-8; and

6. That the plaintiffs have such other relief as the court deems equitable.

All of the defendants (appellees here) who had been served except defendant Southern Pacific Railroad Company joined in duly serving and filing a Notice of Motion to Dismiss Complaint (R. 82-90). Defendant Southern Pacific Railroad Company separately duly served and filed a Notice of Motion to Dismiss Complaint* (R. 180-184). With the notice of motion of appellees Jones et al. was served and filed the affidavit of Royal E. Handlos (R. 90) to which were attached various exhibits consisting of certified copies of records of the Superior Court of the State of California in and for the City and County of San Francisco, and of said Superior Court in and for the County of Sacramento (R. 90-179). With the notice of motion of Southern Pacific Railroad Company there was served and filed the affidavit of Roy G. Hillebrand (R. 184-186).

The motions were duly heard, and, on April 27, 1948, the District Court made its order that "The motions to dismiss are granted" (R. 196-197).

The District Court made certain observations on the failure of the complaint to negative laches, on the insufficiency of averments of mere intrinsic fraud, and ordered the dismissal of the case (R. 196-198).

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*By stipulation, defendant Central Pacific Railway Company joined in the motion (R. 190).

The appellants apparently construe the order granting the motions as denying the motions on all grounds except laches (Appellants' Brief p. 51). We do not so construe the order.

But, in any case, if the motions to dismiss should have been granted on any of the grounds upon which they were based, this Court should affirm the judgment of dismissal.

In *McBrine Co. v. Silverman* (9th Cir.), 121 F.2d 181, this Court said (p. 182):

> "We affirm the dismissals; not, however, on the ground assigned by the trial court, * * *. That we may affirm on a ground not assigned by the trial court is well settled. Collier v. Stanbrough, 6 How. 14, 21, 12 L.Ed. 324; Frey & Son v. Cudahy Packing Co., 256 U.S. 208, 210, 41 S.Ct. 451, 65 L.Ed. 892; 3 Am.Jr., Appeal and Error, Sec. 1163, p. 674; 5 C.J.S., Appeal and Error, Sec. 1849, pp. 1334, 1335."

The motions to dismiss were based on various grounds set forth in the respective notices of motion but the grounds advanced may be condensed into the following:

1. That the allegations in the bill of complaint are insufficient to state a cause of action or to state a claim for equitable relief in favor of any of the plaintiffs or any of the persons on whose behalf the action is brought against any of the defendants (R. 82).

2. That it appears by the bill of complaint itself that the alleged causes of complaint are stale and that plaintiffs and their ancestors have been guilty of gross laches (R. 83).

3. That it appears from the certified copies of court records (subsequent to 1906) attached to the affidavit filed with the motions that plaintiffs and their ancestors were guilty of gross laches in that the alleged causes of complaint were known by them for a great many years prior to the filing of the bill of complaint (R. 83); and such affidavits show, furthermore, that the doctrine of laches applies because, during such delay on the part of plaintiffs and their ancestors, the court records in connection with the Estate of Mark Hopkins (R. 101), as well as essential private records of defendants were destroyed in the 1906 fire (R. 185), and any possible witness who could have knowledge of any of the pertinent facts has long since died, thus prejudicing defendants in their ability to defend this case (R. 102 and 186).

4. That insofar as the bill of complaint sought relief on the ground of fraud it was barred by the Statute of Limitations and particularly by Subdivision 4 of Section 338 of the Code of Civil Procedure of California and insofar as it seeks to determine title to real property, by Section 318 and by Section 319 of said Code (R. 84).

5. That insofar as the bill of complaint sought to have the District Court determine who were in fact the heirs of Mark Hopkins or to have it appoint an administrator *de bonis non,* it failed to state a claim within the jurisdiction of that court (R. 84, 85).

6. That the court lacked jurisdiction over necessary and indispensable parties, namely the successors in interest of Moses Hopkins and of Mary Frances Sherwood Hopkins who were not included among either the plaintiffs or the defendants (R. 86).

I.

THIS COURT, IN FREEMAN VS. HOPKINS, 32 FED.(2) 756 (NO. 5672)* HAS ALREADY PASSED UPON THE PRINCIPAL ISSUES HERE INVOLVED, AFFIRMING THE DISMISSAL OF THE ACTION BY THE DISTRICT COURT.

The Complaint in *Freeman v. Hopkins* was filed in the United States District Court in San Francisco on February 27, 1927, by or on behalf of some of the same plaintiffs as those by or on whose behalf this suit was brought (e.g., plaintiffs Griffin and Chambers—see Record in this court in Case No. 5672, pp. 25 et seq.). The gist of that case, as stated in the opening sentence of the decision, was stated by Judge Dietrich as follows:

> "Norman Lee Freeman, claiming to be an heir of Mark Hopkins, deceased, brought this suit for himself and in behalf of about 450 other alleged heirs, a list of whose names is exhibited with the bill. The object of the suit is to establish a trust in favor of all such heirs, in securities of great value which it is charged were the property of Hopkins at the time of his death and which are presently in the possession of the defendant banks. Generally it is alleged that the securities were fraudulently concealed from the knowledge of the court in the probate proceedings by the deceased's widow and his brother Moses Hopkins, who were successively administratrix and administrator of the estate, and who were the only beneficiaries named in the decree of distribution, which was entered while the latter was administrator. * * * Sustaining defendants' motions, the court below entered a decree dismissing the suit, with prejudice, 'because of laches on the part of plaintiff and for want of equity' in the bill."

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*Certiorari denied, 280 U.S. 575.

Similarly on May 2, 1947, more than twenty years later, the present suit was brought by appellants (plaintiffs below), claiming to be heirs of Mark Hopkins, deceased, for themselves and on behalf of some 205 other alleged heirs, a list of whom is annexed to the bill of complaint (R. 70 et seq.). The object of this suit is to set aside the decree of distribution of November 1, 1883 in the Estate of Mark Hopkins, deceased, on the ground of alleged fraud, that the property therein sought to be distributed did not pass to the distributees therein named but to the plaintiffs herein, subject to administration, etc. R. 46-7). The court below sustained defendants' motions to dismiss (R. 196-7).

In the *Freeman* case, supra, this Court said at p. 758:

> "In the absence of extrinsic fraud of a material character, generally a decree of distribution made by a probate court having jurisdiction constitutes an adjudication in rem and is binding upon all the world. There is here no question of jurisdiction. * * * Having due notice of the intention of the court to distribute the estate and close the administration, it was the duty of all persons having claims to assert them. The court's jurisdiction was not restricted to property inventoried or of which it otherwise had knowledge. Its right and duty was to determine to whom the residue of the estate, the unknown as well as the known property, belonged, and to decree its distribution accordingly. * * *
>
> "By section 1666 of the California Code of Civil Procedure, it is provided that: 'In the order or decree (of distribution), the court must name the persons and the proportions or parts to which each shall be entitled. * * * Such order or decree is con-

clusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.' ''

And again on page 759:

"Upon the subject of laches it is to be noted that this suit was not commenced until February 25, 1927, almost 49 years after Mark Hopkins died and more than 43 years after the administration of his estate was closed. Clearly, we think, to avoid the charge of laches after such a lapse of time, much more should be required than the vague, meager allegations of the bill touching the alleged concealment and the discovery of the alleged fraud. We have scarcely more than the bald statement that Moses Hopkins, and later his friends, concealed properties, and that recently plaintiff accidentally discovered their existence."

The present case was commenced about sixty-nine years after Mark Hopkins died and about sixty-four years after the decree of final distribution was entered closing his estate, and more than twenty years after the plaintiffs or their representatives filed the case of *Freeman v. Hopkins,* supra, which alone shows their knowledge of the essential facts; and we still have practically nothing more than the bald statement that the plaintiffs accidentally discovered the existence of many of the facts alleged only a short time before the commencement of this proceeding, but with no explanation of how, or why not sooner.

We submit, therefore, that the decision of this Court in *Freeman v. Hopkins,* supra, is equally applicable to the state of facts set forth in the complaint in the present case.

II.

THE BILL OF COMPLAINT FAILS TO ALLEGE FACTS SUFFICIENT TO STATE A CAUSE OF ACTION IN FAVOR OF ANY OF THE PLAINTIFFS AGAINST ANY OF THE DEFENDANTS, AND FAILS TO ALLEGE FACTS WARRANTING ANY EQUITABLE RELIEF IN FAVOR OF ANY OF THE PLAINTIFFS.

A. The Bill of Complaint Fails to Show That Plaintiffs Have Any Claim to or Interest in Any Property at Any Time Owned by Mark Hopkins.

The bill of complaint seeks to have the final decree of distribution in the Estate of Mark Hopkins set aside because of various alleged fraudulent acts of Mary Frances Sherwood Hopkins and Moses Hopkins to whom the estate was distributed and because the decree is allegedly void on its face (R. 8-40).

The bill of complaint fails to allege facts showing that any of the plaintiffs or any of the persons on whose behalf the action is brought would have any interest in any of the property of which Mark Hopkins died possessed, assuming all the facts alleged in the bill to be true and assuming they were sufficient to warrant the granting of the relief prayed for and assuming the action had been timely brought and that the court had jurisdiction.

It is alleged in the complaint:

> "That the said Mark Hopkins died leaving the following heirs at law: Moses Hopkins, James Hopkins, John Hopkins, Martin Hopkins, Joseph Hopkins, Annie Hopkins Russell, Prudence Hopkins Russell and Rebecca Hopkins Griffin, who were the brothers and sisters of the deceased." (R. 6).

But it is nowhere alleged that any of the plaintiffs or any of the persons on whose behalf the action is brought has succeeded to any of the interest of any of these heirs

by transfer, by inheritance, by will or otherwise. It is alleged that the plaintiffs are the "descendants" of the alleged heirs of Mark Hopkins (R. 20), and it is alleged that the persons named in Exhibit "F" attached to the complaint "are the next of kin and collateral heirs" of Mark Hopkins. But the estate of a decedent dying intestate vests in his heirs at the time of his death (California Probate Code Sec. 300*), not in those who may constitute his only living next of kin on a date seventy years later.

There is annexed to the complaint a copy of a judgment rendered by the Superior Court of Randolph County, North Carolina, in 1931, purporting to find that certain persons "are the sole heirs at law of Edward Hopkins, Hannah Crow Hopkins and of Mark Hopkins and Moses Hopkins" (R. 151). Whatever the effect, if any, of that judgment may be, it does not establish that any of the plaintiffs or others on whose behalf this action was brought have succeeded to any of the interest in the property of Mark Hopkins which may have vested in the alleged heirs, the alleged brothers and sisters of Mark Hopkins, who the complaint alleges were fraudulently deprived of their inheritance.

The complaint alleges only that the plaintiffs are descended from the defrauded heirs. It does not state that plaintiffs or their ancestors were their devisees or legatees, or succeeded to their rights and properties. The complaint therefore fails to establish any remedial interest in the plaintiffs in or to the cause of action and the Court below properly dismissed the same (47 C.J. 21, Parties Sec. 29).

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*This provision was also in the former Sec. 1384 Civil Code as it stood since 1874.

B. The Complaint Fails to Allege That Any of the Defendants Were Guilty of Any of the Fraudulent Acts Complained of or Had Any Knowledge Thereof or Any Knowledge of Facts Which Should Have Put Them Upon Inquiry.

Except for plaintiffs' contention that the decree of distribution in the Estate of Mark Hopkins was void upon its face, the claim of plaintiffs is predicated entirely upon certain alleged fraudulent acts of Moses Hopkins and Mary Francis Sherwood Hopkins occurring between April, 1878 and November, 1883.

Nowhere in the complaint is it alleged that any of the defendants at any time had any knowledge of this fraud, or were parties to it in any way, or had knowledge of any facts which should have put them upon inquiry.

The nearest approach to such an allegation is found in paragraph 43 of the complaint (R. 33-34) in which it is alleged:

> "* * * that by the recitals in said deed the Ione Coal and Iron Company and its successor, Western Investment Co., and Charles S. Howard Co., and the Western Investment Company, defendants herein, and each of them was put on notice as to the interest of the estate of Mark Hopkins in said land, the issue of the heirs of said decedent, the provisions and defects in the decree of distribution, all as more particularly set forth in Plaintiff's first cause of action."

A copy of the deed referred to is attached to plaintiff's complaint marked Exhibit "D" (R. 61-68). An examination of the deed discloses no recitals which could conceivably put anyone on notice of the fraud alleged. In any case the allegation falls far short of alleging that defendants were put on notice of the fraudulent acts alleged.

In this connection it is immaterial that the alleged fraudulent acts may have constituted extrinsic fraud as distinguished from intrinsic fraud. It is firmly established in California that when a decree of distribution in a probate proceeding has been obtained through extrinsic fraud, a court of equity has no power to set aside the decree, but that its power is limited to holding the distributees who have fraudulently obtained the property to be trustees for the rightful claimants. The leading case establishing this proposition is *Sohler v. Sohler,* 135 Cal. 323, 67 Pac. 282, in which the court says (135 Cal. at 328 and 330):

> "The title conferred by a decree of distribution, after regular proceedings in probate, has always been justly recognized as a title of high and unimpeachable value, because of the nature of the proceedings and of the exclusive jurisdiction which has been vested in the probate court to pass upon the questions involved. If such a decree may at any time be vacated in equity it must result that no title any longer stands secure. * * * So here we hold that, under our system, the utmost that the court in equity could do, if it finds the facts to be as alleged, would be to decree that the defendant Paul Reuss holds title as trustee of the minor plaintiffs, and compel him to make a conveyance and transfer to them accordingly of all that he may have obtained from the estate of the deceased to which they were entitled, or, if a conveyance of specific property may not be had, then to hold him accountable to the plaintiffs for the value thereof. This we believe to be the limit of the power in equity in dealing with the matter, and it is in accordance with the principle adopted by the English courts, expressed by Pomeroy as follows: 'When probate is

obtained by fraud, equity may declare the executor or other person deriving title under it, a trustee for the party defrauded.' ''

This being true, it follows that no cause of action is stated in equity as against the defendants who acquired title by mesne conveyances from grantees of the distributees as it is not alleged that they took title with notice of the fraud.

Hayden v. Hayden, 46 Cal. 332, quoting from headnote:

''If a judgment on the face of the roll appears to be valid, those who purchase property on the faith of it are protected, even if it was procured by fraudulent practice, if they had no actual notice of such fraudulent practices.''

See also:

Pettis v. Johnston, 78 Okla. 277, 190 Pac. 681 (Par. 6 on p. 691);

Freeman On Judgments, 5th Ed. Vol. 3, Sec. 1211.

It is equally well settled that a final judgment or decree of final distribution will not be set aside, even though obtained by extrinsic fraud, as against innocent third parties who have acquired title in reliance thereon.

Doyle v. Hampton, 159 Cal. 729; 116 Pac. 39,

quoting from headnote (159 Cal. at 730):

''A judgment quieting the title to land, which was so fraudulently obtained but which was valid upon its face, will not be vacated at the instance of the person defrauded, as against a subsequent *bona fide* purchaser of the land, who acquired it upon the faith of the judgment, for a valuable consideration, and with-

out notice or knowledge of any fact tending to show fraud in the matter of obtaining the judgment."

Hayden v. Hayden, 46 Cal. 332; 49 C.J.S. 701, Judgments, Sec. 345.

The Appellants apparently base their case largely upon the assumption (unsupported by any argument or authority) that the execution by Moses Hopkins and Mary Frances Sherwood Hopkins of certain deeds conveying their interest in certain property as heirs of Mark Hopkins prior to the rendition of the decree of final distribution constituted a fraud (Appellants' Opening Brief, pp. 2 and 3). Wherein this constituted a fraud on any one is not shown or suggested. The right of an heir to convey his interest in a decedent's estate prior to distribution has always been recognized (11B. Cal. Juris. p. 827). The very recitals in this particular deed negative any suggestion of fraud.

C. The Facts Alleged Are Not Sufficient to State a Cause of Action Based on Extrinsic Fraud in the Procurement of the Decree of Final Distribution.

Obviously to the extent that the complaint alleges fraudulent acts amounting only to intrinsic fraud, it does not state a cause of action, and this proceeding would constitute a collateral attack upon a decree which has long since become final. This the appellants apparently concede (Appellants' Opening Brief, p. 10 and pp. 35-41).

The appellants contend, however, that the complaint alleges acts constituting extrinsic fraud although they fail to point out in their brief how the alleged acts could constitute such a fraud.

Extrinsic fraud in the procurement of a judgment or decree is a fraud which is dehors the issues and consists of a fraud or deception which prevents a party from having his day in court.

Probably the most recent decision in California on this point is *Gale v. Witt* (Cal. Supreme Court Jan. 27, 1948) 188 P. 2d 755, 31 A.C. 371 at p. 374, where the following language appears:

> " 'The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic.' (Westphal v. Westphal, 20 Cal. 2d 393, 397 (126 P. 2d 105); Howard v. Howard, 27 Cal. 2d 319 (163 P. 2d 439); Neblett v. Pacific Mut. Ins. Co., 22 Cal. 2d 393 (139 P. 2d 934); Olivera v. Grace, 19 Cal. 2d 570 (122 P. 2d 564, 140 A.L.R. 1328).) (1) The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of the issues presented to the court for determination. (Thompson v. Thompson, 38 Cal. App. 2d 377 (101 P. 2d 160); Godfrey v. Godfrey, 30 Cal. App. 2d 370 (86 P. 2d 357).)"

Now what facts do plaintiffs allege which could possibly constitute extrinsic fraud perpetrated in procuring the decree?

It is alleged that at the time of applying for letters of administration Mary Frances Sherwood Hopkins knew of the names and addresses of the alleged brothers and sisters of Mark Hopkins and with intent to defraud concealed their names and addresses from the court and from the clerk and that the clerk by reason of said fraud failed to

mail to said heirs notice of the time and place of the hearing on such application (R. 7). But there was no such legal requirement at that time.

The same allegation is made respecting the hearing on the application of Moses Hopkins for letters of administration (R. 8).

It is also alleged that at no time prior to or during the probate proceedings did either Mary or Moses Hopkins notify the said heirs of the death of their brother (R. 21).

It is also alleged that the alleged heirs had no notice or knowledge of the filing of the petition for final distribution (R. 19).

That is all.

Obviously, the writing of a letter by Moses Hopkins at some time "in the early eighties" and possibly long after the decree had become final to the effect that Mark Hopkins died leaving a wife and nine children (R. 21) could not constitute extrinsic fraud or any fraud at all in the procuring of the decree. The court below expressly so found (R. 197). Any representations made to the court by either Mary or Moses Hopkins as to their relationship to the decedent and as to the existence or non-existence of other heirs would be intrinsic and not extrinsic fraud.

In *Hill v. Lawler,* 116 Cal. 359, 48 Pac. 323, the court said (116 Cal. at 361, 2):

> "By filing the petition for the distribution of the estate, and giving the notice required by section 1665 of the Code of Civil Procedure, the superior court acquired jurisdiction to distribute the estate 'among the persons who by law were entitled thereto.' The 'distribution' of an estate includes the determination of the persons who by law are entitled thereto, and also

the 'proportions or parts' to which each of these persons is entitled; and the 'parts' of the estate so distributed may be segregated or undivided portions of the estate. It is declared in section 1666 that 'in the order or decree the court must name the persons and the proportions or parts to which each shall be entitled,' and also: 'such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside or modified on appeal.' A proceeding for distribution is in the nature of a proceeding *in rem,* the *res* being the estate which is in the hands of the executor under the control of the court, and which he brings before the court for the purpose of receiving directions as to its final disposition. By giving the notice directed by the statute the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim, or fail to appear, the action of the court is equally conclusive upon him, 'subject only to be reversed, set aside, or modified on appeal.' The decree is as binding upon him if he fail to appear and present his claim, as if his claim after presentation had been disallowed by the court. (*Estate of Griffith,* 84 Cal. 107; *Daly v. Pennie,* 86 Cal. 552; 21 Am. St. Rep. 61.)''

And in *Goodrich v. Ferris,* 145 Fed. 844 (Circuit Court, Northern District of Calif.) Judge Morrow said, at page 859, 860:

''If in such proceeding the entire world is called before the court, and to enable the court to enter a

valid decree the entire world must have reasonable notice, it will necessarily follow that the notice that will bind all parties must be of such nature as could reach the most distant possible party interested in the estate. To state the proposition is to show its absurdity. It would be impracticable, and, moreover, under such a rule no decree would carry with it any presumption of validity, but rather, on the contrary, invite the presumption that it was invalid. 'Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitude to which they are subject. This is the foundation of all judicial proceedings in rem.' Case of Broderick's Will, 21 Wall. 503, 519, 22 L.Ed. 599."

At the time of the administration of the estate of Mark Hopkins the statutes of California did not require that notice of hearing upon a petition for letters of administration be mailed to the heirs.

The requirement for notice was then set forth in Sec. 1373 of the Code of Civil Procedure. This section, as enacted with the adoption of the Codes in 1872, and which was in effect in that form in 1878, when the petition for letters of administration was filed in the Mark Hopkins Estate (R. 6), read as follows:

"When a petition praying for letters of administration is filed, the clerk must give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the

> place where the court is held, containing the name of the decedent, the name of the applicant, and the term of the court at which the application will be heard. Such notice must be given at least ten days before the hearing."

It was not until 1921 that Section 1373 was amended to require the Clerk to give notice by mailing to the heirs.

Furthermore, at that time the requirement for naming the heirs in a petition for letters of administration was only directory but not mandatory. At that time Section 1371 Code of Civil Procedure, read:

> "1371. (Sec. 58.) Petitions for letters of administration must be in writing, signed by the applicant or his counsel, and filed with the Clerk of the Court, stating the facts essential to give the Court jurisdiction of the case, and when known to the applicant, he must state the names, ages, and residence of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterwards proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments."

But it was held in *Nicholson v. Leatham,* 28 Cal. App. 597, 153 Pac. 965, that an order admitting a will to probate is not void because of the omission to state in the petition the names, ages, and residences of the heirs, legatees, and devisees of the decedent, notwithstanding the same were known to the petitioner, and that an action in equity will not lie to set aside such order. The following language appears in the decision (28 Cal. App. at pp. 601-2):

"* * * even defects in the statement of jurisdictional facts *actually existing* shall not affect the validity of an order admitting a will to probate. The probate of wills and the administration of estates of deceased persons are in the nature of proceedings *in rem,* as to which jurisdiction may be obtained by publication of notice. To sustain appellants' contention and hold that jurisdiction to make such an order depends upon a correct and truthful statement of petitioner's knowledge as to the names and residences of existing heirs, (a fact which appellants claim is not finally adjudicated by the probate court, but can be raised by another action in another court of any subsequent time), would lead to most embarrassing and intolerable results. The petition filed and upon which the order was made after due publication of the notice required by section 1303 of the Code of Civil Procedure, stated the jurisdictional facts required by subdivision 1 of section 1300 of the Code of Civil Procedure. The omission from the petition of a statement of the names, ages, and residences of the heirs, legatees, and devisees of the decedent, even if known to the petitioner, as alleged, could not operate to render the order void for want of jurisdiction, any more than omitting from the petition a statement as to the probable value and character of the estate."

Again, during the time when the probate proceedings were pending, and when the decree of final distribution of the Mark Hopkins Estate was signed by Judge Coffey (R. 144-8), the only legal requirement for notice to the heirs was set forth in Section 1668 Code of Civil Procedure, which at that time read as follows:

"The order or decree may be made on the petition of the executor or administrator, or of any person in-

terested in the estate. *Notice of the application must be given by posting or publication, as the court may direct, and for such time as may be ordered.* If partition be applied for as provided in this chapter, the decree of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed." (Emphasis supplied.)

Therefore, the failure to name the heirs did not and could not have prevented them from receiving all of the notices required by law nor prevent them from appearing; and there was no legal requirement for specific, or mailed, notice to them.

For aught that appears from the complaint, every notice of the probate proceeding required by law was duly given. It is so presumed as a matter of law, Code of Civil Procedure Sec. 1963, Par. 15, 16, 17 and 33. Mary Frances Sherwood Hopkins and Moses Hopkins made no representations of any kind to the alleged heirs prior to the rendition of the decree, and they did not do any act to prevent or which prevented the heirs from appearing and asserting their claim. All that Mary and Moses are alleged to have done was to fail to present the names of those heirs to the court and to the clerk.

That this alone does not constitute extrinsic fraud in the procurement of the decree is well settled by a consistent line of California cases.

Monk v. Morgan, 49 Cal. App. 154, 192 Pac. 1042;
Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158;
Beltran v. Hynes, 40 Cal. App. 177, 180 Pac. 540.

In *Monk v. Morgan,* supra, the court said, 49 Cal. at p. 160:

"It may be further stated *in limine* that the defendant, George Morgan, either in his capacity as a co-heir with said plantiffs in said estate or in his capacity as administrator thereof, owed to the plaintiffs herein no further duty in the way of informing them either of the death of Henrietta M. Cox or of the fact of his appointment to be the administrator of her estate, or of the various steps taken by him as such administrator or by the court in such administration up to and including the entry of the decree of distribution therein, other than that which would have been afforded to them, and each of them, through the giving of the notices required by law to be given during such administration, and which having been duly given constituted constructive notice to said plaintiffs as to the death of the decedent and as to all proceedings taken and had in the course of the administration of her estate."

and at page 161:

"While there is much cogency in this contention we are constrained to hold, in the light of the foregoing cases so relied upon by the appellants herein, that were the respondents to place their reliance solely upon the fact that the defendants herein, in seeking and proceeding with the probate of said estate, indulged in the various acts and assertions and engaged in the giving of the false testimony attributed to them, and thereby so far imposed upon the court as to induce it to make and enter its decree of distribution giving to said defendants the whole of said estate to the exclusion of the plaintiffs herein equally entitled to an undivided one-half thereof, they could not be held to have made a sufficient showing herein to have justified the judgment in their favor, since all of the aforesaid acts and conduct of the defendants must be held, in the light of the foregoing au-

thorities, to have constituted intrinsic fraud from the effect of which the plaintiffs cannot have relief in a court of equity."

Appellants in their brief cite two cases in support of the proposition that the failure of an administrator to report to the court all property belonging to the estate constitutes extrinsic fraud. They are *Weyant v. Utah Savings and Trust Co.,* 54 Utah 181, 182 Pac. 189, and *Goodrich v. Ferris,* 145 Fed. 844. Neither case is even remotely in point.

Weyant v. Utah Savings and Trust Co. involved an action upon an administrator's bond. A woman with whom a married man had eloped probated his estate under a false name and, pretending to be his wife, had the estate distributed to her. The court among other things held that none of the notices required by the statute was given as they were given under a false name.

Goodrich v. Ferris was an action filed in the United States District Court for a decree adjudging that a certain final decree of distribution rendered by the Superior Court of the City and County of San Francisco was of no force and effect as to complainant and for a decree that defendants be held trustees of certain property which complainant claimed he was entitled to as the heir of his deceased wife who was a daughter of the decedent whose estate had been probated. The complaint in that case rested on the ground of the failure of complainant to receive notice of the probate proceedings and on alleged false representations by the executor to the effect that the complainant's wife inherited none of her father's estate.

After an exhaustive review of the cases the District Court dismissed the complaint.

D. The Facts Alleged in the Complaint Do Not Show the Decree of Final Distribution Was Void on Its Face.

In paragraph 19 of the complaint (R. 9) the plaintiffs set forth in paragraphs lettered A to M various allegations purporting to show that the decree of final distribution in the estate of Mark Hopkins was "void." In the brief filed with this court appellants cite not a single authority in support of the proposition that the decree, a copy of which is attached to the complaint (R. 49-53) is either void or void on its face.

Only in paragraph lettered "A" (R. 9) and in paragraph "J" (R. 17) are there any allegations which even bear upon the question of whether or not the decree was void upon its face.

In paragraph "B" (R. 9) it is alleged that: "The said decree affirmatively shows on its face that no notice was given to all the heirs as required by law existing at that time." That this allegation is untrue is shown by an examination of the decree itself, a certified copy of which is attached to and made a part of the complaint. On the contrary the decree recites:

> "And said account and petition this day coming on regularly to be heard, proof having been made to the satisfaction of the Court that the Clerk had given notice of the settlement of said account and the hearing of said petition in the manner and for the time heretofore ordered and directed by this Court." (Tr. 49)

It is then alleged in this paragraph that in 1878 the law required that notice be mailed to each of the "said heirs and legatees." This is erroneous. In appellants' brief at page 33 appears an alleged quotation to that effect from *Dungan v. Superior Court,* 149 Cal. 98; 84 Pac. 767. No such language appears in that decision. There was no such legal requirement. Sec. 1668 Code of Civil Procedure, quoted above as it then read, required only *posting* of notices, not mailing. This constituted due process of law and gave the Superior Court jurisdiction to issue letters of administration. *Estate of Bump,* 152 Cal. 274, 92 Pac. 643.

In paragraph J of the complaint it is alleged (R. 17) "That said decree (of distribution) is indefinite as to the heirship and purported distribution attempted to have been made by said decree" (R. 17). It is true that the decree does not specifically find who are the heirs, but it does purport to distribute the property to the persons which the court found entitled thereto and that is all that was then required by Section 1666 of the California Code of Civil Procedure. That such a decree was sufficient and valid on its face is established by *Miller v. Pitman,* 180 Cal. 540, 182 Pac. 50.

Decrees in probate upon collateral attack are supported by the same presumptions as to validity and the jurisdiction of the court to render them as attach to judgments generally.

Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458.

Copy of the decree is attached to the complaint and made a part thereof, and speaks for itself. By every test it

appears upon its face to be a valid decree rendered by a court having jurisdiction of the subject matter.

In the absence of anything on the face of the decree to the contrary, it will be presumed that all notices required to give the court jurisdiction were duly given.

Miller v. Pitman, 180 Cal. 540, 182 Pac. 50.

It is well settled that the jurisdiction of the Probate Court to administer upon the estate of a decedent is not affected by the failure to name in the petition for the appointment of an administrator or for the probate of a will the name of an heir, even though known to the petitioner, so long as the notices provided for by statute are given.

Murray v. Superior Court, 207 Cal. 381, 278 Pac. 1033;

Nicholson v. Leatham, 28 Cal. App. 597, 153 Pac. 965;

Farmers etc. National Bank v. Superior Court, 25 Cal.(2d) 842, 155 P.2d 823.

It is also well established that absence of a requirement for personal notice in probate proceedings does not deprive an interested person of any of his constitutional rights.

Lilienkamp v. Superior Court, 14 Cal.(2d) 293, 93 P.2d 1008.

DISTRIBUTION OF THREE-FOURTHS OF ESTATE TO THE WIDOW WAS NOT IMPROPER

Appellants' contention that the decree of distribution in the Mark Hopkins Estate was void because it purported

to distribute three-fourths of the estate to the widow, is also without foundation. The Community Property Law was in effect in California at that time. Sec. 1402 of the Civil Code as it then read, provided as follows:

> "Upon the death of the husband, one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. * * *"

The widow was, therefore, entitled to one-half of all the estate as her community property share; and, on account of the absence of a will and the absence of descendants, the remaining one-half was treated as separate property. The law of succession with respect to separate property then appeared in Sec. 1386, paragraph 2, of the Civil Code. This paragraph, as it stood at the time of Mark Hopkins' death, and the commencement of the probate proceedings (Amendments to the Codes 1873-74, 236) read as follows:

> "Two—If the decedent leave no issue, (and) the estate goes in equal shares to the surviving husband or wife, and to the decedent's father. If there be no father, then one half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of

representation; if he leave a mother also, she takes an equal share with the brothers and sisters. If decedent leaves no issue, nor husband, nor wife, the estate must go to the father."

In 1883, when the decree of final distribution was made, paragraph 2 of Sec. 1386 of the Civil Code had been amended April 23, 1880 (Amendments to Codes, 1880, page 14), to read as follows:

"2. If the decedent leave no issue, the estate goes, one-half to the surviving husband or wife, and the other half to the decedent's father and mother, in equal shares, and if either be dead, the whole of said half goes to the other; if there be no father or mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation. If the decedent leave no issue, nor husband, nor wife, the estate must go to his father and mother, in equal shares, or if either be dead, then to the other."

On account of the absence of a will, and the lack of any descendants, the remaining one-half of the estate, treated as separate property, therefore passed one-half to the widow and one-half to the brothers and sisters of the decedent. The widow thus acquired one-half of the estate as community property and one-half of the remainder as her share of the separate property, making three-fourths altogether. This was one of the well-recognized rules of succession at that time.

ALLEGATION OF LACK OF CAPACITY OF ADMINISTRATOR IS NOT AN ALLEGATION OF EXTRINSIC FRAUD AND COMES TOO LATE

The plaintiffs also contend that the appointment of Moses Hopkins in substitution for the original administratrix in 1881, made all subsequent proceedings void because it is alleged (R. 81) that one Moses T. Hopkins had been convicted of an infamous crime in North Carolina in 1845, and hence under then Sec. 1369 C.C.P. he did not have the legal capacity to serve as an administrator.

His qualifications to serve must have been one of the matters passed upon by the Superior Court in San Francisco at the time of his appointment; and if the plaintiffs' allegations are true, then presumably his appointment was based upon perjured testimony; but that would be intrinsic rather than extrinsic fraud, and not a ground for attack upon the probate proceedings at this time. See 1 Bancroft's Probate Practice, Sec. 277, pp. 529, 530, where the following language appears:

> "It is also settled beyond controversy that if the probate court had jurisdiction to appoint someone as representative, the fact that it erred in selecting an appointee does not make its appointment subject to collateral attack. Where a foreign corporation not authorized to do business within the state is appointed, whether or not the appointment is improper so that it might be reversed on appeal or the letters revoked by proper proceeding, so long as it stands it may not be attacked by demurrer to a complaint in an action brought by such corporation as representative. *Similarly the fact that the person who administered upon an estate was a non-resident, and therefore incompetent, is not such a fraud as avoids the administration proceedings.* That a person applying

for letters is a nonresident may be good ground for opposing his appointment, and good cause for removing him after he has been appointed, but his acts as administrator, when once appointed, are neither void nor voidable and cannot be set aside for that reason. This is so even where the acts are attacked during the progress of the administration, and, for a much stronger reason, it is not ground for setting them aside on collateral attack after the administration has been closed. * * *

"Under settled general principles, a judgment appointing a representative, like any other judgment, is never subject to collateral attack because of intrinsic fraud." (Emphasis supplied.)

Under Section 1369 Code of Civil Procedure, as it read up to the time of the adoption of the Probate Code, a person was just as disqualified to act as administrator if he were a nonresident as though he had committed an infamous crime as alleged here; and hence, under the authority cited, his appointment by the court is not such a fraud as to invalidate the probate proceedings; and, unless and until his appointment is revoked, his acts are valid. 2 Bancroft's Probate Practice, Sec. 337, pp. 643, 4 and note in 14 A.L.R. p. 619 et seq.

Furthermore, ever since 1872, when the Codes were adopted in California, the State law has provided a remedy for the situation where an administrator was incompetent to act, such proceedings being taken in the superior court where the probate proceedings were pending. On August 26, 1881, when Moses Hopkins, who is alleged to have lacked the necessary qualifications of administrator because of having in 1845 been convicted

of an infamous crime (R. 81) was appointed administrator of the Mark Hopkins Estate (R. 7), the situation was provided for in Section 1436 of the Code of Civil Procedure which then, as amended in 1880 (Amendments to the Codes, 1880, p. 84), read as follows:

> "1436. Whenever a Judge of a Superior Court has reason to believe, from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled or mismanaged, or is about to waste or embezzle, the property of the estate committed to his charge, or has committed, or is about to commit, a fraud upon the estate, *or is incompetent to act,* or has permanently removed from the State, or has wrongfully neglected the estate, or has long neglected to perform any act as such executor or administrator, he must, by an order entered upon the minutes of the Court, suspend the powers of such executor or administrator until the matter is investigated." (Emphasis supplied.)

Substantially the same provision is still in effect (Probate Code Section 521).

So, also in 1 Bancroft's Probate Practice, Sec. 275, p. 525, the following language appears:

> "The order granting letters adjudges of necessity the right of the person to whom they are granted to such letters. Until reversed or set aside by some proper method, it is conclusive upon the right to administer."

And in California, from the time of the adoption of the Codes until the adoption of the Probate Code in 1931, Section 1428 Code of Civil Procedure, read as follows:

> "*All acts of executor, etc., valid until his power is revoked.* All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid, to all intents and purposes, as if such executor or administrator had continued lawfully to execute the duties of his trust."

This provision was carried forward in substantially the same language in Sec. 525 of the Probate Code.

The acts of Moses Hopkins as administrator of the estate of Mark Hopkins are, therefore, presumptively valid; and it is certainly too late now, especially after the destruction of the records in 1906, and the lapse of so much time, and after conditions are so changed, and without any explanation of why the contention was not made sooner, to allege for the first time that Moses Hopkins did not have the capacity to serve as administrator in 1881, because a Moses T. Hopkins in 1845 had been convicted of an infamous crime in North Carolina.

Where, as here, the records have been destroyed, there is every presumption of the regularity of the proceedings. *Estate of Heywood*, 154 Cal. 312, 97 Pac. 825. See also presumptions specified in Code of Civil Procedure, Sec. 1963, Pars. 15, 16, 17 and 33.

THE DECREE OF DISTRIBUTION OF NOVEMBER 1, 1883, WAS A DECREE OF FINAL, NOT PARTIAL, DISTRIBUTION

Appellees contend with some earnestness that the decree of distribution in the Mark Hopkins Estate (R. 144-148) was only a decree of partial distribution instead of a decree of final distribution as it purports to be. This claim is based upon the allegation that it failed to distribute a

large part of the estate which at one time was known to be in the hands of the administratrix or the administrator, as the case may be, and that in such event, the decree having been made upon petition of the administrator, was void. This contention is also without foundation. While the petition on which the decree was based was doubtless among the papers destroyed in the San Francisco Fire, the decree itself recites that the administrator had filed an account for final settlement and "with said account filed a petition for the final distribution of the estate." (R. 144).

The decree of final distribution after various recitals and findings, included the following (R. 146):

> "It is further ordered, adjudged and decreed that said final accounts of the said Administrator be and the same are settled, allowed and approved and that the residue of said Estate hereinafter particularly described *and any other property not now known or discovered which may belong to said Estate, or in which the said Estate may have any interest,* be and the same is hereby distributed as follows. Three-fourths of said Estate to be distributed to the widow of said deceased, Mary-Frances Sherwood Hopkins, and one-fourth of said Estate to be distributed to the brother of said deceased, Moses Hopkins." (Emphasis supplied.)

Then follows a particular description of the residue of the estate which does not include all of the assets which plaintiffs allege it should have included; and from that they draw the conclusion that substantial assets remained undistributed.

Plaintiffs, however, failed to recognize the very general practice of distributing large estates peacemeal, from time to time, by decrees of partial distribution prior to final distribution; and nowhere in the record does it appear that a large part of the Mark Hopkins estate had not previously been lawfully distributed to the heirs by decrees of partial distribution, leaving only in the hands of the administrator on November 1, 1883, at the time of the decree of final distribution, the particular assets therein mentioned; and even if any assets had escaped particular description in the final decree, they would still be covered by the omnibus language therein, quoted above.

It is certainly too late now, after the destruction of the supporting records and the changed positions of the defendants due to long lapse of time, to contend that there was something irregular about the administrator's acts in 1883, or that the approval of the final account by the Court was improper, or that the decree did not cover all of the assets then remaining in the hands of the administrator.

It was plaintiffs' duty, if they were to claim some irregularity about the proceedings in the Mark Hopkins estate, to have taken timely action to have the papers restored under the Act of June 16, 1906 (Stats. 1906 Ex-Session, p. 73), which authorized the restoration of burned records. Estate of Heywood, 154 Cal. 312, 97 Pac. 825.

Over forty years have elapsed since the San Francisco Fire, and as yet so far as known to appellees the plaintiffs below have taken no such action.

THE DECREE OF DISTRIBUTION AND DEEDS CONTAIN GOOD AND SUFFICIENT DESCRIPTIONS OF THE REAL ESTATE INVOLVED

The decree of final distribution in the Mark Hopkins estate contained among other things the following language (R. 148):

> "It is further ordered, adjudged and decreed that the entire amount of the real estate of which the said Mark Hopkins died seized and possessed and in which the said Estate has any right, title or interest be and the same hereby is set aside and distributed to Mary Frances Sherwood Hopkins, widow of said deceased, * * *".

This is a sufficient description for a conveyance of real estate under the law of California. For illustration:

In *Pettigrew v. Dobbelaar,* 63 Cal. 396, the Court had under consideration a deed which it was alleged was void because it contained no description. The descriptive clause read:

> "All lands and real estate belonging to the said party of the first part wheresoever the same may be situated, together," etc.

The Court held that if the lands in controversy belonged to the grantor they passed by the deed.

In *Frey v. Clifford,* 44 Cal. 335, the descriptive words in the deed were:

> "All my right, title and interest in Sacramento City, Upper California, consisting of town lots and buildings thereon."

The Court held the description was sufficient to convey the lots in controversy.

In *Brusseau v. Hill,* 201 Cal. 225, 256 Pac. 418, the Court held that an instrument reading "that this is my gift of deed, all is in my possession, to Mr. G. W. Brusseau after my death," is sufficient to convey a claimed parcel of real estate where the evidence showed that such parcel was all that the grantor possessed.

It is therefore respectfully submitted that the bill of complaint fails to state a cause of action, and the court below properly dismissed the same:

First: because it does not appear that plaintiffs have any remedial interest in or claim to any property at any time owned by Mark Hopkins.

Secondly: because insofar as the cause of action is based on an alleged fraud perpetrated by Mary Frances Sherwood Hopkins and Moses Hopkins, it is not alleged that any of the defendants participated in the fraud, had any knowledge thereof or of any facts which should have put them upon inquiry; and that insofar as the cause of action is based upon the claim that the decree of distribution was void upon its face the claim is rebutted by the decree itself, a copy of which is attached to the complaint.

Thirdly: because even if the complaint showed plaintiffs had any interest, and even if it showed the defendants took with knowledge of the fraud, the complaint does not set forth facts establishing extrinsic fraud in the procurement of the decree sufficient, under the decisions of the California Supreme Court or of this Court, to warrant interposition of a court of equity.

III.

IT APPEARS FROM THE BILL OF COMPLAINT THAT THE CAUSES OF COMPLAINT ARE STALE AND THAT THE PLAINTIFFS AND THEIR ANCESTORS HAVE BEEN GUILTY OF GROSS LACHES; AND THAT SO LONG A TIME HAS ELAPSED SINCE THE MATTERS AND THINGS COMPLAINED OF TOOK PLACE THAT IT WOULD BE CONTRARY TO EQUITY AND GOOD CONSCIENCE FOR THE COURT TO TAKE COGNIZANCE THEREOF.

Sixty-nine years elapsed since the appointment of Mary Frances Sherwood Hopkins as administratrix of the estate of Mark Hopkins, and sixty-four years elapsed since the entry of the decree of final distribution, before the filing of the bill of complaint in this action. All of the persons having any personal knowledge of any of the facts upon which the claim is predicated have long since died. All of the original papers in the estate proceedings were destroyed by fire in 1906. This all appears from the complaint (Tr. 25, 27).

It is established beyond any question that when one attacks or seeks relief against a judgment rendered many years before and particularly when the action is grounded on fraud the plaintiff must in his complaint allege facts showing that he has used due diligence and is not guilty of laches.

This rule was applied by this court in affrming the dismissal of another bill involving the same estate and substantially the same allegations of fraud as set forth here.

Freeman v. Hopkins (9th Cir.) 32 Fed.(2d) 756; cert. den. 280 U.S. 575.

The rule has been repeatedly applied by the California Supreme Court and by the United States Supreme Court in similar cases.

In *Del Campo v. Camarillo,* 154 Cal., 647 at 657, 98 Pac. 1049 at 1054, the court says:

> "In seeking relief against the effects of frauds occurring so long ago, and in asking a court to cancel the contract and deed, which, in itself, implies a settlement of the wrongs inflicted by those frauds, the plaintiffs are required to allege a clear case and to prove it by satisfactory and convincing evidence. They must clearly show that they did not discover the existence or commission of the alleged frauds until within a reasonable time before the action was begun, that they proceeded promptly upon such discovery, and that their failure to make the discovery sooner was not due to their own lack of diligence. All this must be shown, not merely by a bare statement of the conclusions as we have stated them, but by a detailed statement of the facts and circumstances which caused the ignorance, which prevented an earlier discovery, and which constitute the diligence in seeking a discovery, including also a statement of all facts previously known to them tending to indicate the existence of the frauds."

The rule is well stated in California Jurisprudence Vol. 10, p. 555, Equity §92, as follows:

> "When a complaint for equitable relief shows great lapse of time without the assertion of any claim, and long-continued acquiescence in acts hostile to the claim, the complainant must allege circumstances showing good faith and reasonable diligence on his part. The complaint will be construed most strongly

against the pleader, and if circumstances that might excuse the delay are not alleged, it will be presumed that they do not exist. After a great lapse of time and the death of the original parties equity, for the peace of society, scrutinizes with great particularity bills founded on an alleged belated discovery of facts, and is not satisfied to retain one unless the fullest possible credible showing is made by the applicant for relief. It is not sufficient merely to allege ignorance of rights at one time and discovery at another. The facts and circumstances must themselves be pleaded in order that the court may determine whether the sources of knowledge at last availed of were not at all times open to plaintiff, whether they were negligently overlooked, whether other circumstances should not earlier have put plaintiff upon discovery, and what was the nature of the concealment practiced. Where relief is sought in equity against frauds occurring years prior to the suit, the plaintiff must allege in detail facts and circumstances showing that he did not discover it until within a reasonable time before suing, that he proceeded promptly on making the discovery, and that his failure to make it sooner was not due to his own negligence."

See also:

23 Cal. L. Rev. 79;

Hammond v. Hopkins, 143 U.S. 224; 12 S.Ct. 418; 36 L.Ed. 134.

In the light of the time that has elapsed and tested by this rule what does the bill of complaint allege:

1. That in the "early eighties" one Zebedee Russell "a relative of Mark Hopkins" received a letter from Moses Hopkins stating that his brother, Mark Hopkins,

had died leaving a wife and nine children and had willed all his estate to Moses Hopkins; that "said heirs" "relied on said statements and were lulled to sleep and abandoned the idea of making further investigation of said estate until years later when they discovered said statements were false and made for the purpose of deceiving the heirs at law and the heirs were thereby deceived. That in 1945, and upon the discovery that said statements were false, the legal heirs of Mark Hopkins immediately employed counsel and proceeded to unfold the secret schemes, fraud, and misrepresentation by and between Mary Frances Sherwood and Moses Hopkins, and to assert their rights in and to the estate." (R. 21, 22)

Clearly this does not even allege when the fraud was discovered. It does appear to allege, however, that the original heirs, now all dead, did discover the alleged fraud at some time "years later" during their lifetime.

2. At the end of paragraph 26 of the complaint the following statement is made: "These facts were not discovered by the plaintiffs or their predecessors heirs of Mark Hopkins, or by any of them until September, 1945." It is not clear what facts are referred to here but in any case it is not alleged how they were discovered, or why they were not discovered sooner, or what steps were taken to discover them. The allegation is even less explicit than that in the complaint held insufficient in this regard in *Freeman v. Hopkins* (supra).

3. It is alleged in paragraph 28 of the complaint that the fraud of Mary Hopkins in representing herself as the wife of Mark Hopkins "was not discovered by plaintiffs or their predecessors or by any of them until 1945 when

plaintiff discovered that she was only the housekeeper." How this interesting discovery was made at this late date, or why the alleged discovery was not made sooner, is not disclosed (R. 25).

4. In paragraph 29 of the complaint it is alleged that plaintiffs and their ancestors have used due diligence, yet no facts showing diligence are pleaded (R. 25).

5. In paragraph 29 of the complaint it is alleged that in 1945, plaintiffs "by chance" and "after long research discovered the record of two deeds, one in Sacramento County and one in San Joaquin County." What the significance of these deeds may be is not disclosed, but it does appear from the complaint that these deeds have been a matter of public record for over fifty years.

That these allegations are clearly insufficient to show due diligence and an absence of laches, under the facts alleged, is we believe settled by the above cited authorities and particularly by the decision of this court involving another attack upon the same decree of distribution.

Freeman v. Hopkins (supra) (9th Cir.), 32 Fed. (2d) 756 at 759 and 760.

IV.

IT APPEARS FROM AFFIDAVITS FILED WITH THE MOTIONS AND FROM CERTIFIED COPIES OF DOCUMENTS ATTACHED THERETO THAT THE CAUSES OF COMPLAINT ARE STALE, AND THAT PLAINTIFFS AND THEIR ANCESTORS HAVE BEEN GUILTY OF GROSS LACHES, AND THAT THEY AND THEIR ANCESTORS KNEW OF THE FACTS ALLEGED IN THE COMPLAINT FOR A GREAT MANY YEARS PRIOR TO THE FILING OF THE COMPLAINT; AND THAT BY THIS DELAY DEFENDANTS HAVE BEEN PREJUDICED IN THEIR ABILITY TO DEFEND THE CASE.

The appellees served and filed with the motions to dismiss the affidavit of Royal E. Handlos to which were attached certified copies of various documents constituting the official records of various proceedings had in the courts of the State of California and of the United States involving this estate from which it appears that most if not all of the facts alleged in the complaint were known to plaintiffs for at least twenty-two years prior to the filing of the complaint, or at the very least that they were possessed of information sufficient to put them upon inquiry (R. 90-194). Attention is directed particularly to the affidavits of Estella Cothran Latta (R. 163) and of Jones N. Griffin (R. 167) (plaintiffs herein) attached to an Order for Withdrawal of Certain Affidavits filed in the matter of the Estate of Mark Hopkins in the Superior Court of California in and for the City and County of San Francisco (Ex. K.R. 159).

"Speaking" Motions, a Well Recognized Procedure.

Appellants contend in their opening brief that the court erred in admitting over their objections the affidavit of

Royal Handlos and the exhibits attached thereto. This objection, however, is not included in appellants' list of "points upon which appellant intends to rely" filed pursuant to Rule 19 of the court and is therefore waived (R. 199-202). No objection is raised in either the brief or the points to the admission of the affidavit of Roy G. Hillebrand in support of the motion to dismiss of Southern Pacific Company.

It is respectfully submitted that the affidavits were properly admitted in support of the motions to dismiss on the ground of laches. They merely present indisputable facts in clarification and enlargement of the vague generalities of the complaint. They clearly support the defense of laches and the statute of limitations, defenses properly raised by a motion to dismiss. (*Freeman v. Hopkins,* supra (9th Cir.) 32 Fed.(2d) 756; *Gerard v. Mercer,* 62 Fed. Supp. 28 at 30). The affidavits brought before the court matters of public record and general notoriety such as the general conflagration in San Francisco in 1906, the destruction of the records in the County Clerk's office, and that defendants were prejudiced by the long delay. These matters could not be controverted. They show, among other things, that the facts upon which plaintiffs base their allegations of fraud have been known to them and their ancestors for very many years; and have been referred to in documents which have been matters of public record for upwards of twenty years.

The use of "speaking" motions to dismiss, supported by affidavits of noncontrovertible facts, has been a recognized practice in Federal procedure ever since the adoption of the Rules of Civil Procedure for the Federal

Courts, and long before the recent amendment to Rule 12(b), which expressly permits the use of such affidavits.

The propriety of the use of the Affidavits in such cases is illustrated in *Ellis v. Stevens,* 37 Fed. Supp. 488 at 490, where the Court said:

> "I do not go so far as to hold that a matter of defense to the merits may be presented by a motion to dismiss for lack of a claim stated. I can agree that the allegations of the complaint, so far as they go, must be taken as true; but when, as in this case, the complaint is loosely drawn, with vague and indefinite allegations, and when the question is whether, on the complaint, the plaintiff is entitled to relief in this court, I am convinced that recourse to undisputed facts established by affidavit may be had in order to elucidate the allegations of the complaint."

The Affidavit of Roy G. Hillebrand (R. 184) in support of the railroad motion, calling attention to the lack of record of the alleged holdings of plaintiffs or their ancestors in securities of the railroad, has a clear precedent in *Gallup v. Caldwell* (3rd Circuit) 120 Fed.(2d) 90, which was a suit by stockholders against a corporation. The defendant corporation filed motions to dismiss, etc., and submitted an Affidavit of the Secretary of the Corporation to the effect that plaintiffs were not stockholders of record. The District Court granted the motion. As to the propriety of such "speaking" motion the Court said at pp. 92 and 93:

> "First. We are met at the outset by the question whether it was proper for the court below to make a preliminary investigation, which carried it outside of the pleadings, as to the plaintiff's stock ownership. It

is to be noted that the question involved is not one going to the jurisdiction of the court. Venner v. Great Northern Ry., 1908, 209 U.S. 24, 28 S.Ct. 328, 52 L.Ed. 666; compare McNutt v. General Motors Acceptance Corp., 1936, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed 1135; KVOS, Inc. v. Associated Press, 1936, 299 U.S. 269, 57 S.Ct. 197, 81 L.Ed. 183; Central Mexico Light & Power Co. v. Munch, 2 Cir., 1940, 116 F.2d 85. The problem which, restated, is whether the Federal Rules of Civil Procedure countenance a 'speaking' motion to dismiss, has been much discussed since the adoption of the Rules. Each side of the question has drawn to it distinguished proponents. Their arguments and reasons are collected in a note in 9 Geo. Wash. L. Rev. 174 (Dec. 1940). We think that such procedure should be permitted especially in the kind of situation here presented. See 1 Moore's Federal Practice 645. Despite plaintiff's allegation of stock ownership it is clear that she was not a stockholder whose ownership was registered on the books of the corporation at the time suit was instituted. If record ownership is a prerequisite to the right to bring this action, then it is expedient that the point be decided preliminarily. The alternative would be to sanction discovery and perhaps other pretrial proceedings likely to be exceedingly burdensome upon both parties only to have the case ultimately dismissed at the trial because of the plaintiff's inability to prove a fundamental but initial point. This would not only be a needless waste of the court's time but it would run counter to the mandate of Rule 1 that the Rules 'be construed to secure the just, speedy, and inexpensive determination of every action.' ''

The decision of the District Court was reversed, but on other grounds.

Perhaps one of the clearest statements along this line is in *National, etc. v. Montgomery Ward* (Dist, of Columbia) 144 F.2d 528, one of the leading cases, where the District Court had denied defendants "speaking" motion to dismiss. The United States Court of Appeals for District of Columbia concluded its opinion as follows:

> "Even if the complaint had stated a sufficient claim the uncontradicted affidavits of the defendants would have shown that there was no genuine issue as to any material fact, and their motion for summary judgment should therefore have been granted. In our opinion the affidavits were pertinent, also, to the motion to dismiss. (footnote)
>
> "Reversed."
>
> (footnote, p. 531):
>
> " 'It is not important whether the objection is called a motion to dismiss or one for summary judgment. Since the same relief is sought, the difference in name is unimportant. In any event, the affidavits presented are available on either motion. Federal Rules 6(d), 12(b), 43(e), 56(e), 28 U.S.C.A. following section 723c.' Central Mexico Light & Power Co. v. Munch, 2 Cir., 116 F.2d 85, 87. Gallup v. Caldwell, 3 Cir., 120 F.2d 90; Victory v. Manning, 3 Cir. 128 F.2d 415."

However, regardless of the affidavits, the complaint was properly dismissed on the ground of laches on the basis of the insufficiency of the complaint itself to negative laches in view of the time when the fraud is alleged to have occurred.

V.

THE BILL OF COMPLAINT, INSOFAR AS IT SOUGHT RELIEF ON THE GROUND OF FRAUD, IS BARRED BY THE STATUTE OF LIMITATIONS AND PARTICULARLY BY SUBDIVISION 4 OF SECTION 338 OF THE CODE OF CIVIL PROCEDURE OF CALIFORNIA; AND INSOFAR AS IT SEEKS TO DETERMINE TITLE TO REAL PROPERTY IT IS BARRED BY SECTION 319 OF SAID CODE.

Section 338 of the Code of Civil Procedure of California requires that an action for relief on the ground of fraud must be brought within three years, but the cause of action is not deemed to have accrued until the discovery of the facts constituting the fraud.

When it appears from the complaint that the alleged fraud occurred more than three years prior to the commencement of the action plaintiff, as part of his cause of action, must allege facts showing that the fraud was not discovered until within three years.

In *Osmont v. All Persons,* 165 Cal. 587, 133 Pac. 480, it is held that an action in equity, for a decree holding distributees under a decree of distribution to be trustees of property which they obtained by extrinsic fraud, must be brought within three years after the discovery of the fraud; that it is essential to the statement of a cause of action (if the action is brought more than three years after the time the fraud was committed) for the plaintiff to allege that he did not discover the facts constituting the fraud until within three years immediately prior to the commencement of the action. In this case (165 Cal. at p. 596) the court said:

"The cause of action to set this aside for fraud then immediately arose, and was barred in three years from that date. The right of action upon the fraud of Osmont in procuring the decree, to the end that he might be charged as trustee, is itself barred in three years after the discovery of the fraud. The right of a party to invoke the aid of a court of equity for relief against fraud after the expiration of three years from the time the fraud was committed is an exception to the general statute and cannot be asserted unless the plaintiff brings himself within the terms of the exception. This can only be done by a showing that he did not discover the facts constituting the fraud until within the three years immediately prior to the commencement of his action. This showing is an essential element of the right of action and must be affirmatively pleaded in order to authorize the court to entertain the action." (Citing cases)

It is not enough for plaintiff to merely allege that he did not discover the fraud until within three years. He must show the time and the circumstances under which the facts constituting the fraud were brought to his knowledge so that the court may determine whether the discovery of these facts was within the time alleged. The rule is stated as follows in the leading case of *Lady Washington C. Co. v. Wood,* 45 Pac. 809, 113 Cal. 482 at 486 as follows:

"The right of a plaintiff to invoke the aid of a court of equity for relief against fraud, after the expiration of three years from the time when the fraud was committed, is an exception to the general statute on that subject, and cannot be asserted unless the plaintiff brings himself within the terms of the excep-

tion. It must appear that he did not discover the facts constituting the fraud until within three years prior to commencing the action. This is an element of the plaintiff's right of action, and must be affirmatively pleaded by him in order to authorize the court to entertain his complaint. 'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. It is not enough that the plaintiff merely avers that he was ignorant of the facts at the time of their occurrence, and has not been informed of them until within the three years. He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret or were kept concealed; and he must also show the times and the circumstances under which the facts constituting the fraud were brought to his knowledge, so that the court may determine whether the discovery of these facts was within the time alleged; * * *"

The only pretense of compliance with this requirement in the complaint is the ambiguous allegation at the end of paragraph 26 of the complaint quoted above (R. 24). That this is insufficient under the rules set out in the above cited cases is obvious, and as pointed out by the court below the complaint fails to allege that the brothers and sisters, the original heirs, did not in their lifetimes know

of the fraud or of facts which should have put them upon inquiry. As the court below said, if their rights are barred, so are those of the plaintiffs.

Insofar as the action seeks to determine title to the real property described in the various deeds referred to in the complaint, the action is clearly barred by Section 319 of the Code of Civil Procedure of California reading as follows:

> "No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question within five years before the commencent of the act in respect to which such action is prosecuted or defense made."

VI.

THE BILL OF COMPLAINT, INSOFAR AS IT SOUGHT TO HAVE THE DISTRICT COURT DETERMINE WHO WERE THE HEIRS OF MARK HOPKINS OR TO HAVE IT APPOINT AN ADMINISTRATOR DE BONIS NON, FAILED TO STATE A CLAIM WITHIN THE JURISDICTION OF THAT COURT.

It is well settled that a United States District Court has no original jurisdiction in probate matters.

Cyclopedia of Federal Procedure, 2nd Ed., Vol. 1, Sec. 108 and 122;

21 American Jurisprudence, 377, 433;

Allen v. Markham (CCA 9th) 147 F.(2d) 136;

Harris v. Zion Savings Bank, 317 U.S. 447, 87 Law Ed. 391, 63 S.Ct. 354 at 357.

The extent of the jurisdiction of the United States District Courts in probate matters is not always too clearly drawn in the decisions due to the concurrent jurisdiction of equity and probate courts in some states. From the decisions taken as a whole the rule would seem to be as follows. While a United States District Court may entertain a suit in equity to set aside a decree of distribution on the ground that it was obtained by fraud and may sometimes entertain a suit *inter partes* by an heir against one having control of the property to establish the heir's rights therein, where by state law a probate proceeding is an *in rem* proceeding, the United States District Court has no power to entertain a proceeding to establish heirship, to appoint an administrator or to declare the validity of a will binding on the world.

McClellan v. Carland, 217 U.S. 268, 30 S.Ct. 501, 54 L.Ed. 762;

O'Callaghan v. O'Brien, 199 U.S. 89, 89 S.Ct. 119, 50 L.Ed. 101;

Waterman v. Canal-Louisiana Bank, 215 U.S. 33;

In re Broderick's Will, 21 Wall. 503, 22 L.Ed. 599.

Probate proceedings in California are strictly statutory (Cal. Jur. Vol. 11a, p. 131). They are proceedings *in rem,* binding upon all persons and the whole world is called before the court by the giving of the statutory notices (Cal. Jur. Vol. 11a, p. 131). (*Toland v. Earl,* 129 Cal. 148, 61 Pac. 914.)

In an adversary proceeding such as this, brought by certain plaintiffs against certain named defendants, no court, least of all a United States District Court, would have the power to appoint an administrator for a decedent

who died in California leaving estate in California or to render a judgment determining who are the heirs of such a decedent. Nor could this court direct the State Court to do so, as prayed for herein (R. 47). The necessary parties are not before the court nor have they been called before the court by any form of notice. A decree determining that certain persons are the heirs must of necessity determine that all other persons are not heirs. This can only be done in a proceeding in which all other persons are in some manner called before the proper court; and, as to a decedent dying a resident of California leaving property therein, only in the manner provided in the Probate Code of California.

Appellees submit that the order of the District Court dismissing the action should be affirmed.

Dated: October 23, 1948.

Respectfully submitted,

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